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JOHN T. FEY,

IN THE

Supreme Court of the United States

October Term, 1956

No. 633

ELLEDGE R. PENLAND,

Petitioner,

vs.

NATHAN GOLDEN and MAURICE ROSEN,

Respondents.

Petition for a Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.

ELLEDGE R. PENLAND,
464 West Vernon Avenue,
Los Angeles 37, California,
Petitioner, Pro. Per.

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Petition for a Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.

Petitioner prays that a writ of certiorari issue to review the judgment of the District Court of Appeal of the State of California, Second Appellate District, entered on July 31, 1956.

Opinion Below.

The ruling of the trial court is reported in the Reporter's Transcript, page 20, lines 24-25, and page 21. The opinion of the District Court of Appeal is reported in 143 A. C. A. 656 and set forth in your petitioner's petition for rehearing. Rehearing denied August 27, 1956. Hearing denied September 25, 1956.

Jurisdiction.

The order of the Supreme Court of the State of California denying petitioner's petition for hearing was entered October 2, 1956.

Jurisdiction of this Court is invoked under 28 U. S. C. A., Sections 1257(3) and 2101(c). The right of equal protection of the laws and the right to the due process of law claimed under the Fourteenth Amendment to the Constitution of the United States arise out of the pleadings presented to and rejected, and out of a stipulation of two triable issues presented to and accepted by the trial court.

It was developed by a discussion between counsel for both parties and the trial court:

1. That on the 17th day of May, 1955, Hon. Joseph W. Vickers found: (a) That all defendants were not represented by counsel; (b) That the answer on file to the complaint to quiet title did not protect and safeguard the property and constitutional rights guaranteed; (c) And suggested that defendants be given an opportunity to secure the services of an attorney to prepare proper and appropriate pleadings to defend, protect and safeguard their property and constitutional rights and file and serve plaintiffs' attorney with a copy thereof and returned said cause to the presiding judge.

2. That on the 17th day of May, 1956, the presiding judge ordered all defendants to secure the services of an attorney to represent them in the trial, and (1) to prepare proper and appropriate pleadings to defend, pro-

tect and safeguard defendants' property and constitutional rights; (2) file and serve plaintiffs' attorney with a copy thereof, and be and appear in the department of the presiding judge on the 2nd day of June, 1955, ready for trial.

3. That between the date the defendants contacted the attorney and the date said attorney accepted the cause, it follows (a) said attorney entered his appearance for all defendants but because of the notice requirements of the Code of Civil Procedure, he could not prepare the proper and appropriate pleadings to defend, protect and safeguard defendants' property and constitutional rights and serve plaintiffs' attorney with a copy thereof and be ready for trial on the 2nd day of June, 1955 (the time was too short); (b) the attorney did prepare the proper and appropriate pleadings to defend, protect and safeguard the property and constitutional rights of defendants; (c) an answer and a cross-complaint which called for $75,000.00 damages for breach of contract and other appropriate relief as his answer and defense. But did not file the documents but presented them to the Court and requested the trial court to receive those documents so that the issues may be joined in that manner.

The trial court did accept a document designated an "amended answer" to the complaint on file to quiet title which did not contain a single allegation as a matter of law which would protect and safeguard the property and constitutional rights of defendants, and as a substitute for and in lieu of the document which the trial court refused to accept, prepared by defendant-appellant's attor-

ney which constituted a defense to the complaint on file, accepted a stipulation of counsel of two issues posed to the Court to be tried as the triable issues in said proceedings.

The stipulation of the two issues accepted by the trial court consisted of: (1) The impairment of the obligation of contract between the original contracting parties for a valuable consideration which had already been performed. (2) The impairment of the obligation of written contracts in the plaintiffs-respondents' own handwriting already performed and all original contracting parties were bound by its terms.

The trial court denied the request of defendants' attorney to file any appropriate pleadings suitable to the case which would protect and safeguard defendants' property and constitutional rights guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The Trial Proceeds.

The trial court proceeded to try the cause upon two issues.

1. "The Existence or the Effect of This Alleged 30-year Oral Agreement for a Lease."

This is the provision of the oral contract impaired by the stipulation No. 1:

> "That if plaintiffs' real property located at 4113 South Central Avenue could be zoned for a Pool Hall Business; and Defendants Doris Grose Penland, Charles Penland, and William Penland, could obtain a permit from the Los Angeles Police Commission

to conduct and operate a Pool Hall Business therein, the entire equity of $4000.00, in the 4101 South Central Avenue real property would be tied into the use and occupation of the premises located at 4113 and 4115½ South Central Avenue, as a security to plaintiffs for the re-purchase by the defendants of all Billiard Tables, all Billiard equipment, that plaintiffs had purchased to establish and maintain the Pool Hall Business for the said defendants to operate, plus all items expended by plaintiffs in repairing the premises at 4113 South Central Avenue, so that a Pool Hall Business could be established and maintained in their store room, plus a 10% bonus and 6% interest rate.

"2. That said plaintiffs would maintain the premises at 4113 South Central Avenue to house all Billiard Tables and Billiard equipment purchased by plaintiffs, to be re-sold to said Defendants, together with the living quarters at 4115½ South Central Avenue, for a period of Thirty (30) years."

2. "Whether or Not What Purported to Be a Deed Transaction Was a Security Transaction."

This provision of the oral contract is impaired by stipulation No. 2:

"3. That the sum total of all the items aforementioned in paragraphs 'A' and 'B', would be reduced to a single obligation to pay, and be repaid to plaintiffs in small monthly payments derived from the profits to be earned from the Pool Hall Business to be established and maintained by the investment to be made by plaintiffs in the manner aforesaid.

"4. That said indebtedness would be evidenced by defendant's installment promissory note, secured by the defendant Elledge R. Penland's 4101 South Central Avenue real Property."

Written Agreement of Plaintiffs-Respondents.

"Sale to be consummated by August 8th 1952 on the following terms:

Balance due on note for $1750.00

All money expended for above property from Aug. 8-49

" " owed to date for rents at 4113 and 4115½ S. Central

" " Advanced by N. Golden & M. Rosen for establishment & Maintenance of a billiard room at 4113 S. Central Ave. Plus a ten per cent premium and six per cent interest on said sums.

"Signed NATHAN GOLDEN & MAURICE ROSEN

By Nathan Golden

Partners."

The plaintiffs' attorney in the discussion and presentation of the issues posed to the trial court handed the Court two Municipal Court files No. 983507, claiming some $2,494.00 for rent against defendant-appellant under the covenant of the 1947 lease for failure to pay rent. The authorized tenants licensed by the Los Angeles Police Commission to conduct and operate a pool hall business at 4113, with living quarters at 4115½ South Central Avenue, as the tenants of plaintiffs-respondents under the contract, were not made parties defendants in said Municipal Court unlawful detainer action.

Plaintiffs' attorney called the Court's attention to Cause No. 989783, entitled Golden v. Penland, for $1,700.00 back rent under the 1947 lease. The tenants in possession for whom plaintiffs-respondents expended the total sum of $13,358.35 under their own written contract in their

own handwriting, were not made parties defendant to that original action under the 1947 lease.

Plaintiffs' attorney called the trial court's attention to an affidavit filed on the 18th day of May, 1950, in support of a motion to quash the writ of execution pursuant to the judgment against Elledge R. Penland, defendant-appellant, canceling the 1947 lease and restoring plaintiffs-respondents to the possession of the premises. The defendant in said cause was not only not in possession of said premises but was not entitled to the possession thereof when said unlawful detainer actions were instituted, by reason of two wholly completely performed contracts dated May 22, 1949, and August 8, 1949, when said actions were instituted March 20, 1950, Cause No. 983507, and April 13, 1950, Cause No. 989783.

Plaintiffs' attorneys called the Court's attention to the 1947 lease and the photostatic copy of plaintiffs-respondents' written agreement in the files, Cause No. 989783. Said attorney called the trial court's attention to the lawful eviction under the judgment in Cause No. 989783. [Rep. Tr. p. 11, line 22, to p. 12, line 1.]

These two issues posed to the trial court, and accepted by him as the issues to be tried, not only did not protect and safeguard defendant-appellant's property and constitutional rights but impaired the very foundation of the obligations of two valid contracts for a valuable consideration, one oral on the 22nd day of May, 1949, and the one in plaintiffs-respondents own handwriting, both of which have been performed, dated August 8, 1949.

In ruling on the issues posed but not supported by any evidence, the trial court ruled as follows:

> "The Court: Well, it seems to me, gentlemen, that this matter has been adjudicated already, particularly the right to possession.

Now, then, the defendants have come into court. *They have originally set out an answer filed October 24, 1954, prepared by Mr. Penland. That has been substituted now, or there has been an amendment to it; or rather an amended answer to the complaint, in which they have set up no new matter whatsoever. They haven't set up whatever right or claim they have to this property. It seems to me that they haven't set up anything here.* I don't see what other alternative the Court has but to grant the plaintiffs' motion.

Mr. Earls: *We actually set forth matters in regard to this question in the cross-complaint. Of course, the Court has since denied the admission of the cross-complaint.*

The Court: *Well, Mr. Earls, I appreciate the fact that you are in a tough spot, you are bound by what your clients have done. I know had you filed the original answer for them we wouldn't have had any situation like this.*

On the state of the record now, there isn't any question in the Court's mind that the right of possession has already been adjudicated. If these defendants had any right on this present action, they should have set it up. They haven't set it up. As far as this Court is concerned, there is only one action that he can take, and that is to grant the motion." [Rep. Tr. p. 20, line 24, to p. 21, line 25.]

Motion for New Trial.

Excerpts from notice of intention to move for a new trial:

"II.

"That Plaintiffs' attorney entered into the trial of this cause upon a stipulation by and between the parties as to two issues upon which this case was to be tried,

and moved for Judgment upon the pleadings, but in his discussion of said motion, without objection, went into the trial of the issues as fully and effectully as though proper joinder thereof had been raised by the pleadings, the defective pleadings were amended and the issues of fact raised by plaintiffs' attorney remained to be tried.

"III.

"Finding of Fact No. I.

"That said Finding of Fact No. I is not justified by the evidence.

"IV.

"Finding of Fact No. II.

"That said Finding of Fact No. II is not justified by the evidence.

"V.

"Finding of Fact No. III.

"That said Finding of Fact No. III is not justified by the evidence.

"VI.

"Finding of Fact No. IV.

"That said Finding of Fact No. IV is not justified by the evidence.

"VII.

"This Motion will be made upon the grounds of Mis-Conduct of Plaintiffs' attorney in mis-representation of the facts to the Court in the trial of the issues based upon the stipulation of Counsel, and upon the further ground, that all of said findings Nos. I, II, III, and IV, are not justified by the evidence."

Notice of Intention to Move for New Trial.

A new trial was supported by affidavit of plaintiffs-respondents:

Excerpts from Exhibit "A" [Clk. Tr. p. 13] confirms the oral contract of May 22, 1949 [p. 1, lines 29-32] and further Exhibit "A" confirms that the deed executed in favor of plaintiffs-respondents was a security transaction, and all rents were secured by the title to the assigned real property. [P. 3, lines 2-6.]

Said Exhibit "A" further confirms the security transaction in the motion to vacate the judgment in Cause No. 989783. [P. 4, lines 11-17.]

Said Exhibit "A" further confirms the security transaction of August 8, 1949, when plaintiffs-respondents gave their written agreement in exchange for the title to defendant-appellant's real property by way of a quit-claim deed. [P. 4, line 31, to p. 5, line 6.]

Said Exhibit "A" confirms the fact that the unlawful detainer action under the covenant of the 1947 lease for failure to pay rent consisted of items of rent secured by defendant-appellant's real property. [P. 5, lines 23-26.]

Excerpts from affidavit of Plaintiffs-Respondents' Exhibit "B" [Clk. Tr. p. 18] confirms the oral contract of May 22, 1949. [P. 1, lines 20-23.]

Said Exhibit "B" confirms the institution of the unlawful detainer action, Cause No. 983507, to cancel the 1947 lease for the nonpayment of rents which plaintiffs-respondents agreed to terminate by contract of May 22, 1949, and agreed in writing to terminate on August 8, 1949, *when they delivered the possession of the premises to Doris Penland to procure a permit from the Los Angeles Police Commission to conduct and operate a pool*

hall business in their storeroom at 4113 with living quarters at 4115½ South Central Avenue on August 8, 1949. [P. 1, line 32, to p. 2, line 5.]

Said Exhibit "B" further confirms the institution of Cause No. 989783 to cancel the 1947 lease for failure to pay rent. [P. 2, lines 12-14.]

Said exhibit further confirms the fact that the judgment in Cause No. 989783 was against defendant-appellant only. [P. 2, lines 15-20.]

Said Exhibit "B" confirms the written agreement of August 8, 1949, when they demand the repayment of all items listed in their statement of expenditures in the sum of $13,358.35. [P. 4, lines 23-29; Rep. Tr. p. 14, lines 4-17.]

Substance of oral contract confirmed by Plaintiffs-Respondents' Exhibit "A-I" [Clk. Tr. p. 71; Rep. Tr. p. 26, lines 1-18], and plaintiffs-respondents' written agreement, Exhibit "B-II". [Clk. Tr. p. 78; Rep. Tr. p. 28, lines 4-17.]

Said motion for new trial was further supported by the Municipal Court files, Causes Nos. 983507 and 989783, and the 1947 lease and a photostatic copy of the agreement in said files; a certified copy of the Registrar of Actions of all original documents of Causes Nos. 983507 and 989783 is herewith submitted as a substitute for the original files together with the affidavit of plaintiffs-respondents and the original affidavit of Doris Penland filed May 18, 1950. [Rep. Tr. p. 13, lines 10-14.]

> "The Court: . . . Now let's go to the notice of intention to move for a new trial is based upon the misconduct of plaintiffs' counsel, in the misrepresentation of the facts and issues upon which the

stipulation which in itself could not be sustained by the facts in the case.

Is that the only ground you have for a motion for a new trial?

Mr. Penland: Is that the only ground stated?

The Court: Well, your other ground is 'That plaintiffs' attorney entered into the trial of this cause, upon a stipulation by and between the parties as to two issues upon which the case was to be tried, and moved for judgment upon the pleadings, but in his discussion of said motion, without objection, went into the trial of the issues as fully and effectually as though a proper joinder thereof had been raised by the pleadings, the defective pleadings were amended, and the issues of fact raised by plaintiffs' attorney remained to be tried.'

That is not supported by anything in this case.

Mr. Penland: There is no evidence to support any of the issues, any of the findings, and it is that position I take that entitled the defendant to produce evidence in opposition to those unsupported issues of the findings.

The Court: Well, Mr. Penland, I don't know where you ever practiced law, but in this state we have a right way and a wrong way of doing it. You, unfortunately, have taken the wrong way.

But go ahead if you want to argue; go ahead and argue, Mr. Penland.

Mr. Penland: Well, there is no use arguing if the Court is not listening.

The Court: I am listening to you, I told you to go ahead and argue.

Mr. Penland: Well, if your Honor please, the stipulation by counsel is that there are two issues: One is the existence or effect of this alleged 30-year

oral agreement for a lease, and the other is whether or not what purported to be a deed of transaction was a security transaction. That is on page 5. That is the stipulation as to those two issues.

And in answer to those issues, I wish to state the legal position of the defendant that the lease agreement—it was no lease agreement at all, and in support of that position, I would like to present the Court the original document together with that written agreement on May 22, 1949, the plaintiff and the defendant entered into an agreement whereby the possession of the premises under the 1947 lease would be surrendered to the plaintiff by the defendant and he take possession of the premises under the Contract of May 22, 1949.

The Court: Let me stop you right there, Mr. Penland, what you are attempting to do now is to introduce evidence to prove whatever defenses you may have had to the original complaint. Isn't that what you are trying to do?

Mr. Penland: No, your Honor, the evidence here goes to show that there was no such thing as a 30-year lease. Counsel said there was a 30-year lease, and the Court was satisfied with the provision. There was no lease of any kind or agreement to lease in that document. It was an oral agreement whereby the possession of the premises was delivered to the defendant under the contract and assignment of real property, and the plaintiff in that action, in this action was to establish and maintain a pool hall business for this defendant and resell it to him at cost plus 10 per cent bonus on his investment.

The lease existing at that time was for cash. We paid the defendants some $6,000.00 cash for the use and occupation of the premises under the lease. Under the contract there was no money to be paid the defendants for the use and occupation of the prem-

ises until the business was established which was established and sold to the defendants, and the money was to come from the profits to be earned from the conduct and operation of the business which was to be established when it was tendered.

Now, the question of these unlawful detainer actions. The position of this defendant is that those actions are prosecuted under a lease which was actually void, void by contract and void by act and operation of law. The defendant is in possession of the property now illegally, and has been since the 24th day of May, 1950.

I would like to show the Court in Case No. 983507, now, that has a lease and written memo of the defendant a photostatic copy written memo of the plaintiff given to the defendant on August 8, 1949, when the property was assigned to secure the items set forth in Defendant's Exhibit 'B-I', that is the lease which was surrendered.

The Court: Go ahead.

Mr. Penland: I want to call the Court's attention to Defendant's Exhibit 'B-I', which is a statement of expenditures submitted to the defendant by the plaintiff, in which every item there is charged to the account of Penland and to Penland Real Property, of which $4,000.00, which is the equity in the 4101 South Central real property, is tied into the use and occupation of the premises located at 4113 and 4115½ South Central Avenue.

Based on that statement of expenditures which was submitted to the defendant on the 23rd day of February, 1949—I mean 1950, the statement contains some $6,751.65 overcharges.

The Court: Go ahead.

Mr. Penland: The question of the repayment of those items in this written agreement, counsel spoke

that no tender had been made. They were ready and willing to convey. That is the record. He said that defendant had made no offer to pay that, all right, there was some $6,751.65 of proper items of expenditures omitted. There was $925.33 of overcharges contained in the bill and there was $2,512.63 of credits belonging to defendant that the plaintiff refused to give. It was on the 23rd day of February, 1950, that the plaintiff refused to correct those items, and stated that he intended to recover the possession of the premises delivered to the defendant under the contract, and he proceeded then to institute that unlawful detainer action 983507 against the defendant's minor son.

Under the provision of this lease which was terminated on the 22nd day of May, 1949 . . .

Mr. Penland: That suit was again under the lease which was cancelled. You will notice the complaint in that action. It commences on the 1st day of April, 1949, for rents, which was 52 days before the contract of May 22, was made. It was 140 days before that written agreement of August 8 was signed. It was 275 days before the rents secured, which are asked for in that complaint.

Now, that action is for back rents from April 1st through February, 1950.

The Court: Mr. Penland, haven't all these matters been gone into? I have just completed reading both of these Municipal Court files. Haven't all these matters already been adjudicated?

Mr. Penland: No, your Honor, you look on the 23rd day of May, 1949, the defendant—the plaintiff made application to Judge Schweitzer to bring in new parties defendant. He had judgment against this defendant for the 4115 South Central Avenue, but he couldn't recover the possession of the premises

because they were under the control of Golden West Billiards.

On the 23rd day of May, 1950, he made application to Judge Fay to bring this Golden West Billiards and other defendants in. The Court granted the motion and on the 24th day of May, summons was issued, a 3-day notice, and the defendants were served on the 24th. On the morning of the 25th of May they were dispossessed of the premises. Their things were thrown into the street, and the defendant has, ever since that day been in the use and occupation of the premises without due process of law; and recovered the possession of the premises from Golden West Billiards, he went down and dismissed the action.

So the record shows that Golden West Billiards and Doris Penland have never had their day in court, and that their business and their property have been occupied by the plaintiff without due process of law. They ignored the notice, the summons there, and 989783 gives 3 days exclusive of the day of service. They were served on the 24th, thrown out on the 25th day of May, and it cannot be said as a matter of law that that property has been legally taken from the plaintiff.

The Court: Well, *I can't try those Municipal Court cases here again, any remedy you had in those cases must be taken in the Municipal Court in those particular cases. Those have already been adjudicated.*

Mr. Penland: You can't take that up in the Municipal Court cases—

The Court: *I know the reason why I can't take it up. It is already final.*

Mr. Penland: *I say you can't take it up in the first instance for this reason: They were thrown out and the property taken and the action dismissed. The*

Court instructed the defendant that he would have to proceed in due course, and that is the law. You have to proceed in equity to get relief from that kind of treatment, and it cannot be tried in an unlawful detainer action.

Golden West Billiards was sued under the lease. There was no lease. The question of possession under the contract was not before the Court, and he could not hear it.

Mr. Tenner: . . . *I would like to cover the point as to why after I amended the Golden West Billiards some five years ago. Then I dismissed without prejudice. I was called by a gentleman who is now a member of the Bench, Mr. Fildew, and he asked me would I dismiss. We discussed the case, the merits. He said, 'They do not have any claim. They are going to be put out anyhow. I know."*

Question Presented.

Would a judgment against defendant-appellant canceling a lease and restoring plaintiffs-respondents to the possession of the premises in controversy, prosecuted under a special statute for the benefit of the landlords against tenants for failure to pay rent under the covenant of said lease; where the tenant is limited as well as the jurisdiction of the Court under the special statute to the answer to one question only: *"How much rent have you paid the landlord since the service of notice to pay rent or quit the premises was served upon you? No counterclaim, no cross-complaint or affirmative defense is permitted to a defendant against the landlord in said proceedings*—would said judgment *be a bar to the defendant to show in a subsequent proceeding to quiet title to the possession of the same premises?*

(a) That at the time said unlawful detainer action was instituted said plaintiffs-respondents had by contract accepted possession of said premises and terminated the lease and held the title to defendant-appellant's real property to secure the rents sued for in said action?

(b) That by the terms of the contract already performed, plaintiffs-respondents had delivered possession of the premises in controversy to third parties and had expended a total sum of $13,358.35 on behalf of said third parties' tenancy, who were licensed and authorized by the Los Angeles Police Commission to conduct and operate the business upon the premises as the tenants of said premises and said tenants in possession were not made parties defendants to the original action in which the judgment was obtained?

(c) Would the contract rights of property belonging to defendant-appellant be prejudiced by plaintiffs-respondents' breach of contract in prosecuting the unlawful detainer action to cancel the lease under the special statute?

(d) Would the right of possession to the premises in controversy delivered to third parties under the terms of the contract already performed by plaintiffs-respondents for a valuable consideration be determined or affected or impaired by the judgment under the 1947 lease prosecuted under Section 1161 of the Code of Civil Procedure without making said third parties in possession defendants to said original proceedings or obtaining a judgment against them in a subsequent judicial proceeding?

(e) Would defendant-appellant's property and constitutional rights be placed in jeopardy if his attorney was denied the right to file in the trial court on the day of trial, the proper appropriate pleadings, to defend, pro-

tect and safeguard defendant-appellants' constitutional rights guaranteed by the Fourteenth Amendment to the Constitution of the United States, after it was developed:

(1) That defendant-appellant's attorney for the first time, and in obedience to the order of the presiding judge, consented to come into the case and represent defendants, prepare the proper and appropriate pleadings to defend, protect and safeguard defendants' constitutional rights?

(2) That because of the notice requirements of the Code of Civil Procedure, he could not file and serve Plaintiffs' attorney with a copy, the documents were signed May 26, 1955, the trial was set for June 2, 1955, and requested the Court to receive these documents as his answer and defense to the complaint on file so that the issues may be joined in that manner?

(f) Were the defendant-appellant's contract rights of property placed in jeopardy by the stipulation of two triable issues, based upon the impairment of the obligation of contract for the document prepared by defendant-appellant's attorney as his answer and defense to the complaint on file deny him equal protection of laws or deprive him of life, liberty or property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States?

Has the State of California deprived petitioner of property without due process of law and denied petitioner the right to make and enforce the obligation of contracts contrary to the due process clause and equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States or impaired the obligation of contract, contrary to Article I, Section 10, of the Constitution of the United States

Statement of the Case.

A.

That between November 1, 1947, and June 1, 1949, defendant-appellant was the lessee of 4113 South Central Avenue as and for a real estate office, and 4115½ as and for a dwelling quarters at a monthly rental of $300.00 per month in cash and in advance.

B.

On May 22, 1947, plaintiffs-respondents as lessors of said premises and defendant-appellant entered into an oral contract, whereby the terms of said contract:

1. Possession of the premises was surrendered to the lessors.
2. Lessee accepted possession of said premises as a month-to-month tenant.
3. Defendant-appellant's 4101 South Central Avenue real property was assigned to plaintiffs-respondents as security for their investment in the tenancy of his wife and their two minor sons who were in the Armed Forces in Japan and Guam respectively.
4. Plaintiffs-respondents guaranteed defendant-appellant:
   (a) That they would hold the title to his 4101 South Central Avenue real property in trust for three (3) years.
   (b) That they would not institute any legal proceedings for failure to pay rent for the use and occupation of the premises at 4113 and 4115½ South Central Avenue.
   (c) That they would not institute any legal proceedings for failure to pay monthly on the balance due of $1,109.54 on note of $1,750.00.

(d) That they would collect, account and apply the rents so collected to the annual $1,000.00 first trust deed, and provide all cash deficiencies necessary to pay the taxes and assessments, etc., on defendant-appellant's real property to be assigned.

(e) Defendant-appellant delivered possession of the premises to plaintiffs-respondents on the 22nd day of May, 1949, and did assign his community interest in the 4101 South Central Avenue real property to them on August 8, 1949.

1. On September 13, 1949, based upon the provisions of the oral contract of May 22, 1949, between plaintiffs-respondents and defendant-appellant herein, and the written agreement given in exchange for the title to defendant-appellant's 4101 South Central Avenue real property on August 8, 1949, *when plaintiffs-respondents delivered the possession of the premises to Doris Penland, at 4113 and 4115½ South Central Avenue to procure a permit to conduct and operate a pool hall business in their storeroom at 4113, with living quarters at 4115½ South Central Avenue. The permit was granted by the Los Angeles Police Commission to Doris Penland, William Penland and Charles Penland, co-partners of Golden West Billiards as requested in their application.*

2. That between September 19, 1949, and October 29, 1949, based upon the provisions of the oral contract of May 22, 1949, and their written list of items they intended to invest in the tenancy of Doris Penland, William Penland and Charles Penland and Golden West Billiards as their tenants to conduct and operate a pool hall business in their storeroom at 4113 South Central Avenue dated August 8, 1949, plaintiffs-respondents ex-

pended $13,358.35 in performing their part of the contract. [Ex. "B-I", Clk. Tr. p. 74; Ex. "B-II", Clk. Tr. p. 80.]

That between October 22, 1949, and May 24, 1950, Doris Penland, William Penland and Charles Penland, copartners of the copartnership of Golden West Billiards, conducted and operated a pool hall business at 4113, with living quarters at 4115½ South Central Avenue as the licensed and authorized tenants of plaintiffs-respondents.

That between January 1, 1950, and March 10, 1950, your petitioner paid plaintiffs-respondents the sum of $700.00 cash and $312.63 in cash to Brunswick Co. as and for the rents for the use and occupancy of the premises in controversy.

Your petitioner kept a daily record of all cash receipts from the pool hall business, commodities and rent from rooms for 144 days, a total of $11,123.23, and a daily record of all cash expenditures for salaries, rents and utilities, a total expense of $376.00 and left a net profit of $7,747.23, a day-by-day net profit of $37.24. [Ex. "B-IV", Clk. Tr. p. 83.]

On the 23rd day of February, 1950, plaintiffs-respondents delivered to your petitioner their final statement of all accounts as of December 31, 1949, as an account stated. They demanded that your petitioner make and execute his installment promissory note in their favor for the total sum of $6,474.10 plus 10% bonus on their investment and 6% interest.

Plaintiffs-respondents breached their contract on the 23rd day of February, 1950, when they stated to your petitioner that they never intended to perform their oral or written contracts of May 22, 1949, and August 8, 1949. They intended (1) to institute proceedings to recover

possession of the premises; (2) to take the business of Golden West Billiards and conduct and operate it in their own names; (3) to throw your petitioner and his family into the streets and convert his living quarters into a rooming house, to increase their income; (4) to keep your petitioner's 4101 South Central Avenue real property and there was nothing he could do about it; (5) to prevent your petitioner from performing his contract, because he would not have any money. [Rep. Tr. p. 28, lines 4-19.]

This Is the Provision of the Contract Breached by Plaintiffs-Respondents When These Unlawful Detainer Actions Were Instituted.

"a. That the Lessee was to surrender the possession of the premises located at 4113 and 4115½ South Central Avenue, City of Los Angeles, County of Los Angeles, to the Lessors; that they would terminate the lease and said Lessor would deliver the possession of said premises to the Lessee under the contract.

"b. That the Contract provided that Elledge R. Penland should assign his equity in his 4101 South Central Avenue real property to plaintiffs as security for their investment in the long-term tenancy of Doris Grose Penland, Charles Penland and William Penland to conduct and operate a pool hall business in their storeroom at 4113 South Central Avenue, at a monthly rental of $25.00 per month for each billiard table to be placed in said storeroom on the basis of advice of an expert in the pool hall business; and $60.00 per month for living quarters at 4115½ South Central Avenue."

Specification of Errors to Be Urged.

The District Court of Appeal of the State of California, Second Appellate District, erred:

1. In holding that the trial court did not abuse its discretion in not allowing defendant-appellant's counsel to file the cross-complaint which constituted the only defense for breach of contract for damages of $75,000.00, to the complaint on file which would enable his attorney to defend, protect and safeguard defendant-appellant's property and constitutional rights under the due process clause of the Fourteenth Amendment to the Constitution.

Rochin v. California, 342 U. S. 168;

Snyder v. Massachusetts, 291 U. S. 97;

Palko v. Connecticut, 302 U. S. 319;

Corrigan v. Buckley (1926), 271 U. S. 323;

Shelley v. Kramer (1948), 334 U. S. 1;

Walker v. Whitehead, 83 U. S. 314, 21 L. Ed. 357;

McGee v. Sipes (1948), 334 U. S. 1;

Hurd v. Hodge, Urciolo v. Hodge (1948), 334 U. S. 24;

Barrows v. Jackson (1952), 112 A. C. A. 613, 247 P. 2d 99.

2. In holding that the record did not sustain your petitioner's contention that the stipulation was not embraced in the pleadings. The stipulation was based upon plaintiffs-respondents' breach of the provisions of a contract already performed and embraced not only the impairment of its obligations but its ultimate destruction and all means of its enforcement.

Home Building & Loan Assn. v. Blaisdale, 290 U. S. 398, 78 L. Ed. 418;

U. S. Const., Art. I, Sec. 10;

U. S. Const., Fourteenth Amendment;

Wing v. Forest Lawn Cemetery Assn., 15 Cal. 2d 472;

Cal. Civ. Code, Sec. 3359.

3. In ignoring the Supreme Court's decisions relating to the law governing the relationship of lessors and lessees relating to the acceptance of the possession of the premises under lease and the ending of the term of the leasehold interest of the lessee.

Triest & Co. v. Goldstone, 173 Cal. 240;

Welcome v. Hess, 90 Cal. 507 at 513;

King v. Stanley, 32 Cal. 2d 584, 197 P. 2d 321;

Wilk v. Vencill, 30 Cal. 2d 104 at 108.

4. In holding that the judgment obtained by plaintiffs-respondents by breaching the provisions of their obligation of contract by which they were already bound, against defendant-appellant only in Cause No. 989783 cancelling the 1947 lease, terminated all rights of defendant-appellant to the use and occupation of the premises regardless of whether or not possession of the premises was obtained by contract or otherwise.

5. In holding that Doris Penland's and Golden West Billiards' rights to the use and occupation of the premises created by the contract by and between plaintiffs-respondents and defendant-appellant, the original contracting parties, were terminated by the judgment cancelling the 1947 lease, regardless of the provisions of the contract of May 22, 1949, and the assignment of real property on August 8, 1949.

Reasons for Granting the Writ.

a. Your petitioner challenges the validity of the procedure in every aspect, in its entirety, and in detail, and contends that said procedure and all of its essentials, the means employed to straighten out the defective pleadings, the denial by the trial court to permit defendant-appellant's attorney to file any appropriate pleadings suitable to the case which would protect and defend his substantial property and constitutional rights guaranteed by the Fourteenth Amendment to the Constitution of the United States.

b. The acceptance of the two triable issues embraced in the stipulation of counsel for both parties, which stipulation was based upon the impairment of the obligation of contract already performed and all parties were bound by its terms, and the destruction of the contract in its entirety and all means of enforcement, contrary to the Due Process Clause and the Equal Protection of the Laws Clause of the Fourteenth Amendment to the Constitution of the United States and impaired the obligation of contracts, contrary to Article I, Section 10, of the Constitution of the United States.

c. The procedure, its dominant objectives to proceed to try the case and its arbitrary methods do not consist with the letter and spirit of the Constitution.

d. That the effect of the exertion of state power by the court's decision constitutes the destruction of the contract already performed and a denial of the means to enforce the contract.

e. The effect of the exertion of state power by the court's decision is to deny rights subject to the protection of the Fourteenth Amendment, and the obligation to en-

force these constitutional commands have never been denied a petitioner by this Court.

f. The holding that the taking and seizing of the possession and the business of defendants Doris Penland and Golden West Billiards created, established and maintained by plaintiffs-respondents by the terms of a contract already performed were litigated and determined by an action and judgment against a former lessee, who was not in possession or entitled to possession of the premises when proceedings were instituted, and said tenants in possession by the terms of the contract as the licensed, authorized tenants by the Los Angeles Police Commission as plaintiffs tenants were not made parties defendants to the original proceedings and no judgment was ever obtained in any judicial proceedings against them.

Conclusions.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Dated this 13th day of November, 1956.

Respectfully submitted,

ELLEDGE R. PENLAND,

Petitioner, Pro. Per.